Sending on the substitutes

Nathan Wells examines the removal & replacement of personal representatives

IN BRIEF

▶ Claims under section 50 of the Administration of Justice Act 1985 for the removal of personal representatives: procedure and evidence.

Section 50 of the Administration of Justice Act 1985 (AJA 1985) gives the High Court jurisdiction to remove or replace personal representatives where this is necessary in the interests of the welfare of the beneficiaries and the proper administration of the estate.

The jurisdiction has proved to be a fecund source of litigation and the sphere of operation of AJA 1985, s 50 was increased by the decision in *Goodman v Goodman* [2013] EWHC 758 (Ch), where Newey J confirmed that it could be employed to seek the removal of a named executor (though not a potential administrator) who had not yet obtained a grant of probate.

There was, initially, a striking dearth of reported authority on the operation of the section. Fortunately, that situation has been remedied in recent years and there is a growing body of case law which addresses both the procedural and the substantive operation of the jurisdiction.

The purpose of this article is to highlight two relatively recent decisions of the former chief master, which provide detailed and helpful guidance on two particular aspects of the AJA 1985, s 50 jurisdiction—the appropriate court procedure and the preparation of evidence. The decisions are *Long v Rodman* [2019] EWHC 753 (Ch) and *Schumacher v Clarke* [2019] EWHC 1031 (Ch).

Part 7 or Part 8?

CPR 57.13(5) recognises that the substitution or removal of a personal representative can be sought by application in existing proceedings. But in those cases where new proceedings are being instituted under AJA 1985, s 50, the CPR do not say whether the claim should be brought using the Part 7 or the Part 8 procedure. However, para 13.1(2) of CPR PD 57 states that the s 50 claim form must be accompanied by written evidence containing the grounds of the claim and the specific information identified in the sub-paragraph. This provision indicated that the claim should be instituted using the Part 8 procedure, and this was confirmed by Chief Master Marsh in *Schumacher v Clarke*, where he held that: 'CPR 57.13 does not say that a claim under s 50 of the Administration of Justice Act 1985 must be brought as a Part 8 claim, but this is clearly, to my mind, what is intended by Practice Direction 57, para 13, which requires the claim form to be accompanied by written evidence containing the grounds of the claim as well as other specified particulars' (para [22]).

Consistently with this conclusion, both judgments explain that in the normal case, a s 50 claim will be dealt with at a disposal hearing on the basis of written evidence, rather than at a trial with live evidence. The following points might be highlighted:

- While it would be wrong to characterise the procedure under s 50 as a summary one, it needs to lead to a resolution as quickly as possible, given the damage that can be caused by delay in the administration of an estate (*Schumacher* at para [21](ii)).
- It will be exceptional for a s 50 claim to require a full trial with cross-examination, although this does not rule out the possibility of a party applying for permission to cross-examine where that is really necessary (*Schumacher* at paras [34]–[40]). Similarly, it was observed at para [29](3) of *Long v Rodman* that it is not common for evidence in a s 50 claim to be tested by cross-examination. But it was still implicitly recognised that cases may arise where such cross-examination will be necessary.
- The reason why it will only rarely be necessary to have a trial of a s 50 claim is that it is not normally necessary for the court to make findings in relation to disputed issues of fact for the purposes of dealing with the claim (*Long* at paras

[20] and [68]). The point was explained further at para [18] of *Schumacher*: '[T]he core concern of the court is what is in the best interests of the beneficiaries looking at their interests as a whole. The power of the court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised. If there is a good arguable case about the conduct of one or more of the executors… that may well be sufficient to engage the court's discretionary power under s 50… and make some change of administrator… inevitable. The jurisdiction is quite unlike ordinary *inter partes* litigation in which one party, of necessity, seeks to prove the facts [of] its cause of action against another party'.

In *Schumacher*, the chief master concluded by ordering that the claim was to be heard by a master rather than a High Court judge, noting that the chancery masters have a considerable degree of experience in dealing with s 50 claims and that, in London, they will exercise the jurisdiction in the vast majority of cases.

It is plainly not the case that a s 50 claim will never be dealt with by way of trial before a judge. An example of such a trial can be seen in *Perry v Neupert* [2019] EWHC 2275 (Ch). But the clear indication from the judgments in *Long* and *Schumacher* is that such cases will be the exception rather than the norm. In most cases, the parties can expect the claim to be dealt with by the master (in those cases proceeding before the High Court in London) at a disposal hearing and on the basis of the written evidence.

The preparation of the evidence

As mentioned above, para 13.1(2) of CPR PD 57 requires the claim form to be accompanied by the written evidence in support. Paragraph 13.2 provides that if the claim is for the appointment of a substituted personal representative, the claim form must be accompanied by a signed or sealed consent to act and—if the proposed substitute is an individual—written evidence as to their fitness to act. CPR 8.5 permits a defendant to file and serve written evidence, and also provides for the claimant to file and serve written evidence in reply. Both *Long* and *Schumacher* include important and helpful observations on the preparation of evidence under the AJA 1985, s 50 jurisdiction.

One issue which had sometimes vexed practitioners was whether the evidence should come from the claimant personally, or whether it was sufficient for the claimant's solicitor to put forward the main statement, setting out the relevant background and outlining the case for removal/substitution. In *Long*, the chief master confirmed that the evidence of both claimant and defendant should normally come from the parties personally. The reasons were explained at para [29](3) of the judgment: 'It is not normally appropriate for evidence in a section 50 application to be provided second hand by a solicitor instructed by the applicant or the respondent. The court will usually wish to receive primary evidence. There are two reasons for this. First, the court wishes to hear the account of the witness in his or her own words and not a version filtered by the solicitor. Secondly, although it is not common, and should not be common, for evidence in a section 50 application to be tested by cross-examination, it cannot be assumed when filing evidence at the outset that cross-examination will not be required'. Presumably, however, it will remain appropriate for a solicitor or other professional adviser to provide their own supporting statement in circumstances where, for example, it will be helpful to the court to provide evidence of complicated legal or other technical matters which are of relevance to the claim.

In *Schumacher*, the chief master stressed that: 'It is essential for the court to avoid as far as possible providing a forum for the parties merely to vent their complaints about each other. The core issue is whether the continuation in office of one or more of the parties is detrimental to the interests of the beneficiaries' (para [21](iii)). A similar point was made in *Long*, though it was more obviously addressed to legal representatives: 'In every case, those representing the applicant(s) should make the case for replacement in a dispassionate way. The role of the witness statements is to provide the court with the evidence it needs to make what is sometimes a finely judged decision. Save in a case of obvious wrongdoing, it should be possible for the evidence to make the case without tendentious comment. It is one thing to offer conclusions to be drawn from the evidence, but quite another to mount a personal attack on the incumbent' (para [31]).

These observations need to be acted on by lawyers advising on the presentation of a claim or defence under s 50. These are claims in which there is often a difficult and sensitive background history, frequently involving at least some element of familial dissension. A client may be keen to use the litigation as a means of ventilating the real or perceived grievances of the past; but it is clear that this is not the purpose of the section and that the focus of the evidence must be on the key issues of beneficiary welfare and the proper administration of the estate.

Having said this, it will frequently be necessary for the witness statements to refer to past acts or omissions in order to explain why there is or is not said to be concern for the future of the administration. As Judge Pearce observed in *Cockerham v Cockerham* [2019] 2 WLUK 752, at para [33]: 'the question that the courts must ask is whether the administrator whose appointment is challenged can be expected to carry out the administration in an efficient and proper manner. That is a forward-looking test, though what has happened in the past may be of relevance'. The task for the legal adviser is to identify what material is genuinely relevant and to put forward the conclusions to be drawn from that material in as focused and clinical a manner as possible.

Finally, one turns to the evidence of suitability of a proposed individual substitute. The importance of such evidence had been adverted to by the chief master in *Harris v Earwicker and others* [2015] EWHC 1915 (Ch), at para [10]. In *Long*, he stressed that such evidence is to be filed when the claim is made, as this helps the defendant to assess the strength of the claim at the outset. He added that evidence of fitness to act should normally come from an independent person, and not from the proposed appointee (para [29](6)).

However, this was said in a context where the proposed appointees were not obviously independent parties. A question remains whether independent evidence of fitness to act will be required in those cases where the proposed appointees are themselves independent solicitors. In *Liu v Matyas* [2020] EWHC 2807 (Ch), Deputy Master Linwood directed that the potential professional appointees in that case should provide evidence of fitness 'from a solicitor who knows them and can attest to them personally and their work' (para [23]). That was, however, a case in which the specific identity of the professional appointee appears to have been a matter of particular contention. On the basis of past experience, it is suggested that it should be appropriate for a proposed professional appointee to provide their own evidence of fitness in those cases where the ultimate identity of the professional appointee is likely to be a less rigorously contested issue. NLJ

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